



## STRATEGIC ADVISORY BOARD FOR INTELLECTUAL PROPERTY POLICY STRATEGIC PRIORITIES FOR COPYRIGHT

### COMMENTS FROM THE ALLIANCE AGAINST IP THEFT

The Alliance Against IP Theft welcomed the establishment of the Strategic Advisory Board for Intellectual Property (SABIP) and is grateful for this first opportunity to contribute formal comments to its work programme.

The paper states that ‘Strategic Priorities for Copyright’ is not a formal consultation paper but instead considers a series of themes and issues. We have identified a number of these themes and issues – notably whether the current system is complex, the need for greater education on exceptions and problems with enforcement and remuneration – and will focus our contribution to these areas.

The paper states that there is *“compelling evidence that we are experiencing paradigm shift in way we create, consume, diffuse, adapt and share information, creative works, knowledge and entertainment”*. This is undoubtedly true. However, as explained below, we do not believe that such a shift necessarily needs to lead to whole scale changes to the UK’s copyright system.

#### **FLEXIBLE NOT COMPLEX**

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The document asserts that current UK copyright law is complex and that some of the *‘boundaries of copyright exceptions are now unclear, and their operation can cause confusion’*.

We respectfully disagree. The UK system is based on a balance of exclusive rights for those who develop copyright material and freedom of contract for those creators as to how their work is transferred, licensed and used. While a system that protects a huge breadth and number of right holders (without imposing any arbitrary costs or formalities), and safeguards a number of user interests, is sometimes described as “too complex”, diversity should not be confused with complexity. Indeed, the very diversity of interests protected by copyright demonstrates its flexibility. The system allows rights holders to make material available under almost whatever terms they wish, and for users to adopt – or reject – these terms as they wish. It is this very flexibility that encourages the development of such a variety of business models which are essential to economic growth

Inherent in copyright is a very simple message – if you have created an original piece of work, be you a multi-national company or an ordinary member of the public, it is yours and it is protected. It does not discriminate according to quality, experience, money etc. If you wish to

use a work which you did not create then, apart from the existing exceptions, you need permission from the rights owner. There is no need for this to change.

## Education

In our recent response to the IPO's copyright review, we acknowledged that confusion may exist amongst some with regard to how the exceptions operate in practice. However, we take issue with the often trivial examples used to demonstrate this apparent confusion and uncertainty. The current system of copyright exceptions allows works to be used without the need for a licence or permission, which is (and always has been) part of the inherent flexibility which exists in our system of copyright. In addition, a host of new management systems are being developed within industry to resolve any outstanding issues there may be within particular industry sectors over accessing these exceptions. Whilst it will always be helpful for right holders and users to have a dialogue that fosters an understanding of these exceptions, what they permit and what they do not permit, we do not believe that the solution to any confusion lies in amending, broadening or introducing new exceptions, but in education.

This need for education was stressed in our response to the IPO:

What is perhaps lacking (and the government acknowledged this in its previous consultation with the pledge to allocate £100,000 to an awareness campaign regarding the proposed format shifting exception) is the necessary degree of information and public education around exceptions. The Alliance maintains that the perception and interpretation of exceptions is as important as the exceptions themselves; consumers must be clear and correct about what the law, and any changes to it, allows them to do and what remains impermissible. If the concerns regarding clarity and certainty are to be properly addressed the government will need to invest more alongside industry, which already plays its part in awareness building, through education programmes. Fundamental to this are initiatives which promote the value of copyright and the damage caused by copyright theft to which, for example, the audio-visual sector invested £2.5m in 2008.

The Alliance and its members have supplied the IPO with evidence previously on these matters in our responses to the consultation on copyright exceptions, to which we are awaiting a response from government. We also addressed a number of these issues again in our submission to the EU's Green Paper on Copyright in the Knowledge Economy – a copy of which was sent, as requested, to the IPO.

As demonstrated in both of these submissions, there does not seem to be any need for changes to copyright exceptions. To date, existing legislation has proved to be adequately flexible to accommodate technological development and new uses. Indeed, the Copyright Directive's extensive list of exceptions -- including for transient copies -- is ideally-crafted to enable a range of uses, many of which may have been unanticipated at the time of the Directive's adoption. Such an approach not only protects against legislating for legislation's sake but also protects against the potential dangers introducing unnecessary changes may bring.

We also believe a disproportionate amount of attention is given to the perceived "tensions" that apparently exist between copyright based businesses – such as film, music, sports, publishing and software - and their customers. This overlooks the obvious fact that consumers are the life-

blood of these businesses, and that it makes no sense for those businesses to act in a manner that is contrary to the needs of their customers.

An issue does arise, however, over whether it is adequately clear to consumers what is lawful and what is not, or why it is important that when content is accessed directly, payment, depending on the business model, may be required. Industry acknowledges that more work needs to be done in this area and while communications campaigns which deliver these messages already exist, more are being developed.

However, there are those who deliberately break the law. Our system of copyright should not be remoulded to accommodate their wrong doing and any perceived 'right' to something for nothing they may claim to have – anymore than shoplifting should be excused because it was deemed socially acceptable to the perpetrator.

### **Is consolidation of copyright law required?**

We do not believe that any significant consolidation of copyright law is required. It is all contained within one piece of legislation, the Copyright Designs and Patents Act 1988. As outlined above, we strongly challenge the assumption that copyright law is complex – or, indeed, any more complex than other areas of law. It is said that its application and enforcement can appear to be the preserve of specialist lawyers. However, this is the case with many areas of law which impact and affect our everyday life such as employment, health and safety and contract.

## **ENFORCEMENT AND REMUNERATION IN THE DIGITAL AGE**

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Flowing from this, therefore, we do not see 'complexity' as being the root cause of problems with enforcement; these are found in a lack of resources, inconsistent priority setting amongst law enforcement, mixed messages from government, and a general lack of understanding of and respect for the value of IP.

### **Remuneration**

The unauthorised distribution of content, be it music, film, computer software and games software, publications, visual art or unauthorised retransmission of sports broadcasts, is against the law. In many ways, acquiring content online should be viewed as comparable with traditional shopping; just as someone would walk into a shop and buy a CD or book or subscribe to a magazine, similar payment needs to be made for material accessed and downloaded from the internet, if that is the business model the rights holder has chosen. This is crucial in order for creators and rights holders to be assured of remuneration for, and control of, their work and investment. Most people agree that it is a crime to help oneself to the property of another without payment or permission, and accessing content online must be viewed in the same way. This fundamental principle must be upheld if we are to ensure the creative industries' survival as we go further into the digital age.

However, it must be remembered that this is a very fragmented market place with different business models being needed to service different needs. New business models have developed, (see Appendix 1), which not only allow creators to distribute their material in new innovative ways, but crucially have introduced new methods for companies to interact with consumers, thereby increasing the range of platforms in which consumers can access products

and the pricing options open to them. Where such new services have not succeeded, fault can be found in the business model adopted as opposed to any failings of copyright

We, therefore, challenge the assumption that the copyright framework needs to respond to *'consumers' desires to access content...at a price they are willing to pay'*. What if the answer to what consumers are willing to pay is 'nothing'? Such an approach also fails to take account of the price the owner wishes to charge. Surely the issue of pricing is best addressed by market forces; content owners price their products – taking into account the need to recoup marketing, production and distribution costs, and of course, the ability of their consumers to pay. Market forces (led by consumers voting with their wallet) then quickly let them know whether their chosen pricing structure is successful or not. Furthermore, the development of music services like Spotify and We7 where the consumer pays nothing but rightsholders are remunerated by the service provider who earns advertising revenues, demonstrate that the existing copyright framework is very capable of responding to consumers' needs.

### **Enforcement**

The paper rightly draws attention to the challenges presented by modern web-based technologies which have a global reach and do not respect national frontiers. FACT is currently involved in a case which demonstrates exactly the legal and logistical challenges in enforcing rights in such an environment. In this case the servers hosting the infringing material are in Panama, the money is in a bank account in Latvia (with up to \$40,000 per month going in from advertising), while the individual involved is a UK national.

However, we do not believe that such the solution to addressing such difficulties is to change the system. Instead, what needs to occur is for the current system to be properly enforced. While the digital revolution has created many opportunities for owners and creators of content, questions remain as to the effectiveness of the current enforcement framework.

### **Impact on industry**

However, the ease with which people are able to illegally access content with no remuneration to, or permission from, the owner of the copyright (be that the creator or a commercial rights holders) is inflicting significant damage on numerous sectors, affecting their ability to reinvest in new talent and innovative ideas. In particular -

- The audio-visual industry estimates it lost £152m in 2007 from online film piracy.
- The music industry, particularly affected owing to the speed by which music files can be downloaded, estimates it lost £180m in 2008 purely from digital copyright theft and estimates it will lose, in the five years 2007-2012, £1.2bn.
- The Background Report on Digital Piracy of Sporting Events, compiled by the Premier League supported by 26 other international sports organisations for the OECD, outlines the damage digital copyright theft has on the sports industry's ability to invest in grassroots and give to good causes.
- The video games industry is seeing an ever increasing number of unlawful downloads of game software and the growing availability of circumvention devices that make accessing those works possible.

The easy availability of illicit material also serves to perpetuate the belief that just because a development in technology has resulted in goods or services becoming accessible for free, it should therefore be made available for free.

The scale of the threat to the creative and content industries, and others whose copyright is made available and being infringed online is of such a scale that if this issue of enforcement is not adequately addressed, the prospects for these industries look very bleak indeed. As stated in our submission to the IPO's consultation:

Whether content is accessed / purchased in a traditional retail store or online the same rules and values must apply. What is unacceptable and illegal in the physical environment does not suddenly become acceptable and legal simply by virtue of it taking place online. Taking content without permission from the rights owner (whether that permission lies with a commercial rights owner or the original creator), or infringing any form of intellectual property, is unlawful. There is a value and ownership attached in law which needs to be protected and enforced.

It is an unfortunate fact that piracy, both physical and digital, remains the most substantial drain on investment, creativity and innovation in copyright-rich industries, such as music, film, software, games, publishing, and for sports rights owners. Whilst robust copyright protection is a key driver of the UK's creativity, technological progress and competitiveness as a whole, it is important to keep in mind that copyright theft and inadequate copyright enforcement have precisely the opposite effect—they allow unauthorised, unpaid copying and distribution to compete unfairly with and undermine the business models for legitimate content distribution. Copyright theft, whether involving physical goods or on-line activities, damages legitimate sales, lowers governments' tax revenues, hurts jobs in upstream and downstream industries and damages innovation and competitiveness.

The harm this causes to innovation and investment is neatly demonstrated by the fact that, according to the BPI, in 2007 record companies reinvested 23% of revenue in A&R (the music industry's equivalent to R&D. With the industry projecting it will lose £200m in 2009 from online piracy alone, it would be devastating if this important investment suffers.

It is also impossible to believe that such huge hits on revenue can avoid having equally big impact on the numbers of people employed in the creative industries. To use the music industry as an example, they are not the "fat cat executives" of blogosphere myth – they are the young people who help identify and nurture talent, working in the A&R teams at record labels; or who help to promote new and established artists, working in the marketing and media relations teams at labels; or they are the 10,000 people – according to CCS – working in the recording sector; or the 15,000 people in the retail and distribution sector. These are real people, whose jobs and livelihoods are put on the line by online copyright infringement

#### **MORAL V COMMERCIAL RIGHTS**

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The paper includes an interesting discussion around the notions of moral and commercial rights. Whilst it can be said that copyright contains both economic and moral rights the Alliance does not believe they are incapable of working in parallel.

## **IMPACT OF PARADIGM SHIFT: COUNTERING COMMON MYTHS**

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The Alliance is concerned about certain ‘myths’ which have arisen in this area, backed up by little or no evidence. We would like to take this opportunity to address some of these:

*The digital revolution has led to the involvement of the individual consumer at each step of the process, including acting as copier and distributor of materials to the public on a wide scale, and not just as end user as in the past.*

While this may be true, it needs to be made clear that those that are acting as copier and distributor without permission or agreement from the rightsholder are doing so outside of the law. Official channels of distribution exist for very valid reasons – it ensures the product reaches the consumer with the quality that the creator intended maintained; it ensures consumer can have confidence from who they are buying from and confidence that their money is not going to fund illegal activity; and, importantly, that payment is going to the people who created the product.

This is emphatically not about trying to put the genie back in the bottle but about challenging the assumption that this should just be accepted. Surely, we should, instead, be communicating to consumers the value of the material they wish to access and that only by accessing it from a legitimate source can payment return to creators.

*The division between consumers and producers is increasingly being blurred through digital co-creation.*

We are concerned that statements similar to this are appearing more and more. While digital technology does makes such blurring theoretically possible, we believe this statement wrongly gives the impression that such activity is not only widespread but is likely to become increasingly so. In the small number of instances where it is happening / has happened, we question whether these people are in fact ‘consumers’ or are cottage industry ‘creators’ seeking financial reward for their creations? If the latter is true and financial remuneration is being sought then surely the owners of the original rights should be recompensed. We would be very interested to see evidence which proved the opposite.

## **CONCLUSION**

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In conclusion, we believe the copyright framework has the flexibility to manage the transition into the digital world. We believe that many of the alleged difficulties with the copyright framework are not borne out in evidence. Copyright owners and producers are changing the way they exploit their intellectual property within the new digital environment and although ways of protecting copyright will need to change, as will the models for its exploitation, these can develop within the existing framework.

**May 2009**

## **ABOUT THE ALLIANCE AGAINST IP THEFT**

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Established in 1998, the Alliance Against Intellectual Property (IP) Theft is a UK-based coalition of 21 associations and enforcement organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. With a combined turnover of over £250 billion, our members include representatives of the audiovisual, music, video games and business software, and sports industries, branded manufactured goods, publishers, retailers and designers.

The Alliance is concerned with ensuring intellectual property rights are valued in the UK and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly protected. Our Members work closely with trading standards and local police forces to reduce the harm caused by intellectual property crime in local communities and ensure legitimate businesses and traders are able to operate fairly.

We work closely with the Department for Innovation, Universities and Skills and the UK Intellectual Property Office to raise awareness of the harm caused by IP theft. We are also participants in the IP Crime Group, which facilitates cross departmental dialogue and joint working amongst the relevant enforcement bodies and organisations.

## **ALLIANCE MEMBERS**

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Anti-Counterfeiting Group  
Authors' Licensing and Collecting Society  
British Brands Group  
BPI (British Recorded Music Industry)  
British Video Association  
Business Software Alliance  
Cinema Exhibitors Association  
Copyright Licensing Agency  
Design and Artists Copyright Society  
Entertainment and Leisure Software Publishers Association  
Entertainment Retailers Association  
Federation Against Copyright Theft  
Federation Against Software Theft  
Film Distributors Association  
Institute of Trade Mark Attorneys  
Motion Picture Association  
Premier League  
Publishers Licensing Society

### **Associate members:**

Anti-Copying in Design  
British Jewellery, Giftware & Finishing Federation  
Video Standards Council

## APPENDIX 1

### Online services

- According to the PA, 90% of scholarly journals are now available online, and academic books are widely available through a variety of e-book aggregators and platforms.
- The audio-visual industry already offers a number of online services which provide consumers with a choice of payment options depending on how and when they access it and how long they wish to keep it for. Further information can be found at <http://copyrightaware.co.uk/howtodownload/index.asp>
- Premier League content is available in a variety of forms across the full range of distribution platforms (including by means of the Internet and mobile technologies). For example, across the world, the Premier League's long form audiovisual rights are made available for exploitation on a platform neutral basis meaning fans everywhere can legitimately watch simulcasts of live and near live Premier League matches online (as well as via more traditional broadcast means – cable, satellite, terrestrial, IPTV etc). In addition, in territories around the world, the Premier League licenses clips packages specifically for exploitation by means of mobile technologies and the Internet. Taken together, this approach enables fans to access key content legitimately in a form which suits them and across a wide range of technologies. Finally the Premier League's member clubs also made available footage of their Premier League matches (in long form and clip formats) across a range of media by means of their Club channels, Club websites and Club mobile offerings.
- Many ELSPA members are now offering traditional game software through digital download. Electronic Arts offers consumer the choice of purchasing most PC games from retailers on optical disk or by directly downloading from the EV store at [www.ea.com](http://www.ea.com). Nintendo also offers *Wiiware* games for download to its *Wii* through the Internet (see [www.nintendo.com/wii/wiiware](http://www.nintendo.com/wii/wiiware)). Other industry sources for legitimate downloads of games are provided by games publishers, console manufacturers and retailers, examples being [www.xbox.com/live](http://www.xbox.com/live), [www.gamee.co.uk/Downloads](http://www.gamee.co.uk/Downloads), [www.gamesplanet.com](http://www.gamesplanet.com).
- The music industry has created a one-stop-shop which provides links to all the legal sites such as i-tunes UK, Spotify, Last.fm, DJ Download.com, Nokia Music UK and Track It Down. [www.pro-music.org/Content/GetMusicOnline/stores-europe.php](http://www.pro-music.org/Content/GetMusicOnline/stores-europe.php)